REMARKS

Applicants have studied the Office Action dated August 14, 2003 and have made amendments to the claims. It is submitted that the application, as amended, is in condition for allowance. By virtue of this amendment, claims 1-21 are pending. Reconsideration and allowance of the pending claims in view of the above amendments and the following remarks is respectfully requested.

In the Office Action, the Examiner:

- Rejected claims 1-21 under 35 U.S.C. §102(e) as being anticipated by Phaal. (U.S. 6,055,564).

Rejection under 35 U.S.C. §102(e)

As noted above, the Examiner rejected claims 1-21 under 35 U.S.C. §102(e) as being anticipated by Phaal (U.S. 6,055,564). Independent claims 1, 9, 11, and 21 have been amended to clarify over Phaal. As an initial matter, Phaal is directed to a server-side or host processing system application for managing server services. See Phaal at least at col. 1, lines 10-16, col. 4, lines 60-64, and FIG. 2. Accordingly, the present invention distinguishes over Phaal for at least this reason because unlike Phaal, all of the processing and managing is performed by a client-side computer not a host or server-side computer. Independent claims 1, 9, 11, and 21 have been amended to clarify this client computer processing.

Further, it is not possible using a server to

- Independent claim 1 and 11

  pinging at least one server to calculate locally at the client computer a response time between the client computer and the server;

  obtain percentage of CPU utilization of the client;

  calculating a weighted result of the response time and the CPU utilization

  checking a percentage of CPU utilization of a client computer;

- Independent claim 9

checking a ping response time between the client computer and a server computer; and

obtaining a count at the client computer of a number of downloads currently underway

- Independent claim 21

a client download scheduling intelligent agent for accepting specification from a user of a period during which a download is to be performed, and determining a time within the period for performing the download by

pinging at least one server to calculate locally at the client computer a response time between the client computer and the server;

obtain percentage of CPU utilization of the client;

calculating a weighted result of the response time and the CPU utilization;

determining locally at the client computer, a time for performing a download between the time period which the download is to be performed and the second threshold time value based on the weighted result.

because these types of actions are performed only from a client's perspective.

The Examiner at page 3 of the Office Action states: "*As per claims 5, 15, Phaal discloses a method according to claim 4, wherein said step of obtaining one or more measures comprises a sub-step of:*

- *Obtaining a measure of ping response time between the client and the server (column 7, lines 1-5).*"

However, careful reading of Phaal col. 6, line 59 through col. 7, lines 1-15 discloses a scheduler 135 for a server to calculate a later time when it can be expected that the deferral message can be processed by the server. The Applicants respectfully submit that the Examiner is confounding "*ping response time*" between two computers coupled by a network with a scheduler application running on a server. The concept of a ping response time is not

related to a scheduler application running on a server. A ping response is a basic Internet program that lets you verify that a particular IP address exists and can accept requests. The verb *ping* means the act of using the ping utility or command. Ping is used diagnostically to ensure that a host computer you are trying to reach is actually operating. Ping can be used with a host that is operating to see how long it takes to get a response back. (See Generally on line URL www.whatis.com). Accordingly, independent claims 1, 9, 11, and 21 distinguish over Phaal for at least this reason as well.

The Examiner cites 35 U.S.C. § 102(e) and a proper rejection requires that a single reference teach (i.e., identically describe) each and every element of the rejected claims as being anticipated by Phaal.[1] The elements in independent claims

- Independent claim 1 and 11

  pinging at least one server to calculate locally at the client computer a response time between the client computer and the server;

  obtain percentage of CPU utilization of the client;

  calculating a weighted result of the response time and the CPU utilization

  checking a percentage of CPU utilization of a client computer;
- Independent claim 9

  checking a ping response time between the client computer and a server computer; and

  obtaining a count at the client computer of a number of downloads currently underway

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[1] See MPEP §2131 (Emphasis Added) "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). "The identical invention must be shown in as complete detail as is contained in the ... claim.

- Independent claim 21

pinging at least one server to calculate locally at the client computer a response time between the client computer and the server;

obtain percentage of CPU utilization of the client;

calculating a weighted result of the response time and the CPU utilization;

are not taught or disclosed by Phaal. Moreover, Phaal expressly *teaches away, is inoperable,* and *destroys the intent* of Phaal from a client computer application.[2] Accordingly, the present invention distinguishes over Phaal for at least these reasons. The Applicants respectfully submitted that the Examiner's rejection under 35 U.S.C. § 102(e) has been overcome.

Independent claims 1, 9, 11, and 21 have been amended to distinguish over Phaal. Claims 2-8, 10, and 12-20 depend from independent claims 1, 9, and 11 respectively; since dependent claims contain all the limitations of the independent claims, claims 2-8, 10, and 12-20 distinguish over Phaal, as well.

CONCLUSION

The remaining cited references have been reviewed and are not believed to affect the patentability of the claims as amended. Specifically, the reference of Chang et al. (U.S. 6,134,584) was commonly owned i.e., the International Business Machines Corporation, at the time the claimed invention was made, and that this effectively disqualifies the cited reference as prior art. See also

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[2] Although this is a rejection under 35 U.S.C. 102, this is important should the Examiner choose to attempt to combine Phaal with other art under 35 U.S.C. 103. The Federal Circuit has consistently held that when a §103 rejection is based upon a modification of a reference that destroys the intent, purpose or function of the invention disclosed in the reference, such proposed modification is not proper and the *prima facie* case of obviousness cannot be properly made. See In re Gordon, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

MPEP § 706.02 (l) (3).

In this Response, Applicants have amended certain claims. In light of the Office Action, Applicants believe these amendments serve a useful clarification purpose, and are desirable for clarification purposes, independent of patentability. Accordingly, Applicants respectfully submit that the claim amendments do not limit the range of any permissible equivalents.

Applicants acknowledge the continuing duty of candor and good faith in the disclosure of information known to be material to the examination of this application. In accordance with 37 CFR §1.56, all such information is dutifully made of record. The foreseeable equivalents of any territory surrendered by amendment is limited to the territory taught by the information of record. No other territory afforded by the doctrine of equivalents is knowingly surrendered and everything else is unforeseeable at the time of this amendment by the Applicants and their attorneys.

Applicants respectfully submit that all of the grounds for rejection stated in the Examiner's Office Action have been overcome, and that all claims in the application are allowable. No new matter has been added. It is believed that the application is now in condition for allowance, which allowance is respectfully requested.

PLEASE CALL the undersigned if that would expedite the prosecution of this application.

Respectfully submitted,

Date: November 14, 2003 By: _____

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ABSTRACT OF THE DISCLOSURE

SOFTWARE AND METHOD FOR CONTROLLING THE TIMING OF DELAYED DOWNLOADS

A system for accepting a specification of a time interval during which a download is to be performed on a delayed basis is described. The system can also select a time within the specified period. The selection can be randomized with the aim of distributing the load placed on computer and communication resources, or the selection may be based on testing a number of measures of computer and communication resource availability, and selecting a time of low utilization. A fuzzy measure of resource availability can be obtained, e.g., as a weighted sum of multiple measures, or each measure can be tested against a limit separately. According to another aspect of the invention a system and computer readable medium is disclosed for carrying out the above method.